

UNITED STATES DISTRICT COURT
DISTRICT OF RHODE ISLAND

ALBERT L. GRAY, et al.

vs.

JEFFREY DERDERIAN, et al.

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C.A. No. 04-312 L

STATE'S OBJECTION TO PLAINTIFF'S
MOTION FOR PARTICULARIZED NEED DISCOVERY

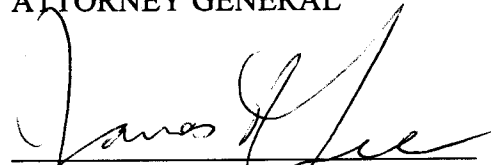
The State of Rhode Island hereby objects to plaintiff's Motion for physical evidence in a serious, *pending* criminal proceeding. For reasons stated in the accompanying memorandum said Motion should be referred to the Superior Court Judge presiding over the criminal proceeding.

Respectfully submitted,

State of Rhode Island

By Its Attorney,

PATRICK C. LYNCH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 11th day of January, 2005, a copy of the within was e-mailed to the certification list.

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STATE'S MEMORANDUM IN SUPPORT OF ITS
OBJECTION TO PLAINTIFF'S
MOTION FOR PARTICULARIZED NEED DISCOVERY

I. Introduction

Defendant State of Rhode Island hereby responds to Plaintiffs Motion for Particularized Need Discovery. In said Motion plaintiffs seek several square feet of foam that was seized pursuant to a search warrant in a State criminal case. Contrary to the moving papers on file herein, the State has no current plans to test or otherwise destroy any foam seized from The Station nightclub. Moreover, the State has agreed to notify the Superior Court, the parties to the State case and the plaintiff's committee herein (through Mr. Mandell) as well as the defense committee through designated counsel prior to any destructive testing of the foam seized from The Station. Finally, this Motion does not, and cannot, address the rights of the parties in the pending criminal proceeding and, therefore, this Court should defer ruling on this issue to the Superior Court in which all interested parties are present.

II. Argument

As this Court knows, there is pending in State Superior Court a criminal action in which three (3) defendants are charged with 200 counts of manslaughter. That case has been assigned to Justice Francis J. Darigan Jr. who is overseeing all evidentiary issues in the case, including the distribution of any foam seized from The Station. In addition to this Motion for discovery, the plaintiff's committee has filed a Declaratory Judgment action in Superior Court that has also been assigned to Judge Darigan in which they seek the following relief:

WHEREFORE, Plaintiffs request the following relief:

1. That the Court declare that Plaintiffs have a protectible interest in being heard prior to any further testing of the foam.
2. That the Court preliminarily and permanently enjoin the State of Rhode Island and the Town of West Warwick, by and through their agents, servants, employees and others acting on their behalf from dissipating, destroying, testing or otherwise disposing of or transferring to any party any polyurethane foam seized from the site of The Station Nightclub Fire until after Plaintiffs receive notice of the State's intention (with testing methods, available quantities and protocols set forth) and Plaintiffs have had an opportunity

to be heard by the Court on the subject including the presentation of expert testimony, if necessary.

3. That the Court order such additional relief as is appropriate to protect the interests of the parties.

Thus, Judge Darigan has before him all the parties who have expressed any interest in the foam. As such, Judge Darigan is the judge who is best equipped to balance the need for foam among all the interested parties. Obviously, he is charged with overseeing the constitutional rights of the three defendants and his is the only Court in which that weighty responsibility is present. It is a responsibility that must not be taken lightly and that must be considered anytime a related criminal action is pending.

As Judge Pettine noted in United States v. Hugo Key and Son, Inc., 672 F.Supp 656658 (D.R.I. 1987) “administrative policy gives priority to the public interest in law enforcement.” Quoting Driver v. Helms, 402 F.Supp 683, 685 (D.R.I. 1975). Therein Judge Pettine stayed all civil discovery at the request of the United States because a criminal action was pending.

The State is not requesting such a remedy in this case. Rather, the State merely asks that discovery as to one piece of physical evidence in a serious, *pending* criminal proceeding be addressed by the Judge who is presiding over that action. This is a far less drastic request than made by the government when civil discovery was sought that might affect or relate to a pending criminal action in other cases. See Twenty First Century Corporation v. LaBianca, et al., 801 F.Supp. 1007 (E.D.N.Y. 1992); In re Ivan Boesky Securities Litigation v. Drexel Burnham Lambert, Inc., 128 F.R.D. 47 (1989);

Judge Darigan is holding a status conference in his Courtroom on January 21 and one of the issues to be discussed will be use of the foam. On information and belief, Mr. Mandell spoke to Judge Darigan on or about Monday, January 10, 2005, and has been advised of the date of the hearing/conference.

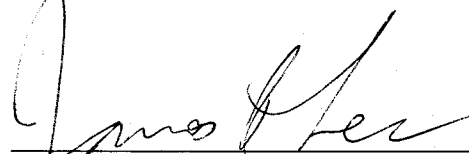
Since Judge Darigan is the only jurist with all interested parties before him, and since no destructive testing of the seized foam is contemplated prior to January 21, 2005, and since the use of the seized foam will be before Judge Darigan on January 21, 2005, this Motion should be denied and the plaintiff's committee (and any other interested parties) should address their request(s) for physical evidence in the pending criminal proceeding to Judge Darigan.

Respectfully submitted,

State of Rhode Island

By Its Attorney,

PATRICK C. LYNCH
ATTORNEY GENERAL

A handwritten signature in dark ink, appearing to read "James R. Lee", is written over a horizontal line.

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